

**OPEN RECORDS AND MEETINGS OPINION
2001-O-12**

DATE ISSUED: September 26, 2001

ISSUED TO: Randall Sickler, Attorney, Southwest Multi-County Correction Center

CITIZEN'S REQUEST FOR OPINION

On August 12, 2001, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Richard Volesky on behalf of the Dickinson Press asking whether the Southwest Multi-County Correction Center violated N.D.C.C. § 44-04-18 by failing to respond to his requests for records within a reasonable time. On August 24, Mr. Volesky made a second opinion request alleging the SWMCCC violated N.D.C.C. § 44-04-18 by requiring that records requests be made in writing.

FACTS PRESENTED

On June 21, 2001, Mr. Volesky sent the following written request to the Southwest Multi-County Correction Center (SWMCCC):

Please check if youth were placed by any other agencies other than tribal governments, the federal government or as mentioned in the above two cases, during the time period of Jan. 1, 1999 to May 31, 2001. If there apparently were not others, a brief note to me saying so would be sufficient. If there were such youth, please make those files available as well, and let me know when they will be available.

On June 28, 2001, Mr. Volesky was reviewing records at the SWMCCC and tabbed a number of pages for copying. According to a sworn affidavit signed by SWMCCC Office Supervisor Rita Binstock, "Mr. Volesky stated that either himself or a Dickinson Press employee, Rhonda Hecker, would pick up the copies at a later date." Binstock Affidavit at para. 5. Mr. Volesky denies making such a statement. Later that day, Mr. Volesky made a written request for a copy of a one-page report regarding a juvenile inmate and indicated the copy of the report could be added to the other copies requested earlier that day.¹ A

¹ Mr. Volesky's June 28 letter alleges he had made an oral request for the record earlier that day but was told by the SWMCCC his request had to be in writing. This alleged violation occurred more than thirty days before Mr. Volesky's request for this opinion and may not be reviewed under N.D.C.C. § 44-04-21.1.

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few days after these requests for copies were made, the SWMCCC contacted Mr. Volesky about a delay in its response to the requests due to the Fourth of July holiday and Mr. Volesky agreed to give the SWMCCC a few more days to make the copies.

After nearly a month, Mr. Volesky had not received the copies he requested and he sent a follow-up letter on July 31 noting his outstanding requests. He also asked for an explanation of the discrepancy in the total number of juvenile placements at the SWMCCC between records he obtained from the North Dakota Association of Counties and records he had previously obtained from the SWMCCC. His June 21 request asked for access to files of all youths "placed" at the SWMCCC. After hearing nothing for ten days, Mr. Volesky requested an opinion from this office.

According to the SWMCCC, the copies requested by Mr. Volesky were made on July 10 when the office supervisor, Rita Binstock, returned to work after the Fourth of July holiday. The copies were put in an envelope and placed in Ms. Binstock's desk drawer to be picked up according to Mr. Volesky's instructions. Again, Mr. Volesky denies leaving such instructions and argues he was waiting for the SWMCCC to let him know when the copies were ready to be picked up. The SWMCCC states it had no further contact with Mr. Volesky regarding the requested copies until it received his July 31 letter on August 2, 2001. By that time, N.D.C.C. §12-44.1-28 became effective and made a number of records regarding county jail inmates confidential or closed to the public.

A response by the SWMCCC to the July 31 letter was prepared on August 6 but not received by Mr. Volesky until August 13, 2001, a day after Mr. Volesky submitted his first request for this opinion. In its response, the SWMCCC advised Mr. Volesky it was uncertain whether he still wanted the copies that had been waiting to be picked up for a month. The SWMCCC denied having a policy requiring requests for records be made in writing, but asked Mr. Volesky to submit his requests in writing "to assure you are receiving what you had requested." The response further stated:

If you are still planning to pick up the 61 pages of duplicated records would you please notify us in advance as we need to assure that the release of these records comply with any new North Dakota State Laws on the open records which would have gone into [effect] on August 01, 2001.

Letter from Norbert Sickler to Richard Volesky (August 6, 2001).

On August 23, 2001, another employee of the Dickinson Press, Rhonda Hecker, stopped by the SWMCCC to obtain the requested copies. According to Ms. Hecker and Mr. Volesky, Ms. Binstock refused to provide the copies, stating Mr. Volesky had to specify in writing the records he wanted. This alleged response prompted Mr. Volesky's second request for an opinion from this office. The SWMCCC disagrees with this account of what

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occurred and claims that Ms. Binstock merely asked Ms. Hecker to have Mr. Volesky contact Ms. Binstock to discuss the concerns expressed in the August 6 letter to Mr. Volesky. The SWMCCC denies that Ms. Binstock ever told Mr. Volesky or Ms. Hecker that a written request was required.

ISSUES

1. Whether the SWMCCC violated N.D.C.C. § 44-04-18 by not providing copies of the records requested on June 28 and July 31 within a reasonable time.
2. Whether the SWMCCC violated N.D.C.C. § 44-04-18 by not responding within a reasonable time to the June 21 and July 31 requests for access to the files of all youths who were "placed" at the SWMCCC from January 1, 1999, to May 31, 2001.
3. Whether the SWMCCC violated N.D.C.C. § 44-04-18 by requiring that requests for records be made in writing.
4. Whether the enactment of N.D.C.C. § 12.1-44.1-28 precludes the SWMCCC from providing access to or copies of records requested prior to the August 1, 2001, effective date of the statute.

ANALYSES

Issue One:

Any person is entitled to copies of open public records upon request. N.D.C.C. § 44-04-18(2). A request for copies of open records may not be "unreasonably delayed." N.D.C.C. § 44-04-18(7). In a prior opinion to the SWMCCC, this office indicated that permissible delays in providing copies of open public records will generally be measured in hours or a few days rather than several days or weeks. 1998 N.D. Op. Att'y Gen. O-04. In this case, Mr. Volesky requested the copies on June 28, and agreed to an extension of time until after the Fourth of July holiday, but had still not received the copies on August 12 when he requested this opinion.

Under most circumstances, a delay of a month in providing copies of requested records would be unreasonable. Once a person makes a request for open records, it is the responsibility of the public entity to respond to the request within a reasonable time and the requester is not required to contact the entity again to find out when the records will be provided or made available. 1998 N.D. Op. Att'y Gen. O-04. However, according to the SWMCCC, Mr. Volesky stated on June 28 that someone would pick up the copies at a later date. Mr. Volesky strongly disputes making such a statement, but this office cannot resolve disputed questions of fact in an opinion issued under N.D.C.C. § 44-04-21.1.

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Accordingly, under the circumstances presented in this opinion, I am unable to conclude that the SWMCCC failed to provide copies of open public records within a reasonable time under N.D.C.C. § 44-04-18. The June 28 request is still pending, subject to the outcome of this opinion.

Issue Two:

On June 21, Mr. Volesky also requested access to files of all youth "placed" at the SWMCCC from January 1, 1999, to May 31, 2001. He received no response to this request.² As proof that he had not previously been given access to all such records, Mr. Volesky has submitted a letter he received from the Association of Counties showing that over 200 juveniles were held at the SWMCCC from January 1, 1999, through December 31, 2000. Many of these juveniles were held at the SWMCCC for "attendant care." Mr. Volesky indicates his prior requests for files of juveniles held at the SWMCCC had only produced about 59 files.

In its response to the request for this opinion, the SWMCCC explained that its prior responses to Mr. Volesky's requests did not include juveniles held for "attendant care." However, the language in Mr. Volesky's June 21 request was clear: he asked for access to the files of all juveniles "placed" at the SWMCCC. This request is not limited to those incarcerated or confined at the SWMCCC and includes those receiving "attendant care" at the SWMCCC.

In follow-up correspondence with this office, the SWMCCC asserts it was unclear from the June 21 request, viewed in the context of Mr. Volesky's prior requests, whether his request included juveniles in "attendant care" at the SWMCCC or was limited to juvenile "inmates." I disagree. The SWMCCC's interpretation of the June 21 request, regardless of the context of Mr. Volesky's prior requests, overlooks the clear statements in the June 21 request that Mr. Volesky felt his past requests for files of "juvenile inmates" were too narrow and he wanted to expand his request to include all placements.

² In its response to the request for this opinion, the SWMCCC argues the June 21 request was overbroad and was not a request for specific records as required in N.D.C.C. § 44-04-18. I disagree. A request for a large number of records is not, by definition, overbroad. Rather, Mr. Volesky's request reasonably identifies the records to which he sought access. Prior opinions from this office have established that little, if any, of the SWMCCC's records were closed to the public under the law as it existed prior to August 1, 2001. The breadth of Mr. Volesky's request affected the time within which the SWMCCC was required to respond to the request, but not whether the request was sufficient under N.D.C.C. § 44-04-18.

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The SWMCCC did not deny Mr. Volesky's June 21 request for files of juveniles in attendant care, nor did it provide those files as he requested. I conclude Mr. Volesky's request for those files is still pending and the SWMCCC has violated N.D.C.C. § 44-04-18 by not responding to the request for access to those files within a reasonable time.

Issue Three:

It is a clear violation of N.D.C.C. § 44-04-18 to require that requests for open public records be made in writing. N.D.C.C. § 44-04-18(2) (request "need not be made in person or in writing"). The requests for this opinion allege two statements by SWMCCC Office Supervisor Binstock to Mr. Volesky and Ms. Hecker that requests for open public records must be submitted in writing. The alleged statement to Mr. Volesky occurred more than 30 days before the request for this opinion and therefore cannot be reviewed under N.D.C.C. § 44-04-21.1. Ms. Binstock has signed a sworn affidavit denying she told Ms. Hecker a written request was required. Although I am troubled by these multiple allegations of the same offense, it is beyond my authority in issuing opinions under N.D.C.C. § 44-04-21.1 to resolve disputed facts. For purposes of this opinion, I must assume as true the SWMCCC's statement it did not require that open records requests be in writing. According, it is my opinion that the SWMCCC did not violate N.D.C.C. § 44-04-18.

Issue Four

The opinions expressed above normally would conclude this office's response to Mr. Volesky's requests. However, prior to explaining the remedial actions and further actions the SWMCCC must take in response to Mr. Volesky's pending requests, I must address the application of a new exception to the open records law for certain inmate records.

During the 2001 legislative session, a bill was enacted closing to the public certain records of correctional facilities such as the SWMCCC. 2001 House Bill 1398; 2001 N.D. Laws ch. 125, § 1. This new law is codified as N.D.C.C. § 12-44.1-28 and became effective on August 1, 2001. Under the new law, "medical, psychological, and treatment records of an inmate are confidential." N.D.C.C. § 12-44.1-28(1). "Institutional discipline and conduct and protective management records" of inmates, other than inmates who were sentenced to the facility, are also confidential. N.D.C.C. § 12-44.1-28(6). However, "[r]ecords with respect to inmate identification, charges, criminal convictions, bail information, and intake and projected release dates are open records." N.D.C.C. § 12-44.1-28(4). The question becomes whether the new law applies to the requests for copies or access made by Mr. Volesky prior to the effective date of N.D.C.C. § 12-44.1-28.

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There is no provision in 2001 House Bill 1398 indicating N.D.C.C. § 12-44.1-28 should be applied retroactively. See N.D.C.C. § 1-02-10 ("No part of this code is retroactive unless it is expressly declared to be so."). "[A] statute is applied retroactively if it operates on transactions which have already occurred, or on rights or obligations which existed before its enactment." Glaspie v. Little, 564 N.W.2d 651 (N.D. 1997). In determining whether an application of a statute would be retroactive, one must look at the conduct regulated by the statute. Because a new or amended statute expanding or restricting access to public records "deals with the availability of public records, not the recordation function of government units," a public entity's response to an open records request is not governed by the law in effect when the requested records were created, but rather by the law in effect on the date the entity is required to respond to the request. State of Hawaii Organization of Police Officers v. Society of Professional Journalists, 927 P.2d 396, 398 (Haw. 1996), quoting State ex rel. Beacon Journal Publishing Co. v. University of Akron, 415 N.E.2d 310, 313 (Ohio 1980). See also North Carolina Electric Membership Corp. v. North Carolina Dep't of Economic and Community Development, 425 S.E.2d 440 (N.C. Ct. App. 1993); News Press Publishing Co., Inc. v. Kaune, 511 So. 2d 1023 (Fla. Dist. Ct. App. 1987); Industrial Foundation of the South v. Texas Industrial Accident Bd., 540 S.W.2d 668 (Tex. 1976).

As discussed in Issues One and Two in this opinion, Mr. Volesky's June 28 request for copies and June 21 request for access are still pending. Mr. Volesky's right to be given access to the records he requested on June 21 existed long before the August 1 effective date of N.D.C.C. § 12-44.1-28. To apply the new statute to the records requested on June 21 would interfere with an existing right to be given access to those records and therefore would be an unauthorized retroactive application of N.D.C.C. § 12-44.1-28.

With regard to the June 28 request for copies, the SWMCCC made the requested copies and put them in an envelope on July 10 for Mr. Volesky to pick up at his convenience. Thus, even if Mr. Volesky said he would pick up the copies, the SWMCCC's duty to prepare the copies was completed several weeks before the effective date of the new open records exception. Mr. Volesky's right to the copies arose when the copies were completed, and it would be an improper retroactive application of N.D.C.C. § 12-44.1-28 to apply the statute to the copies he requested.

In conclusion, it is my opinion that N.D.C.C. § 12-44.1-28 does not apply to Mr. Volesky's June 21 request for access or his June 28 request for copies.

CONCLUSIONS

1. The SWMCCC did not fail to provide copies of requested records within a reasonable time under N.D.C.C. § 44-04-18.

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2. The SWMCCC violated N.D.C.C. § 44-04-18 by not responding within a reasonable time to the June 21 and July 31 requests for access to the files of all youths who were "placed" at the SWMCCC from January 1, 1999, to May 31, 2001.
3. Under the facts presented, the SWMCCC did not require that requests for records be made in writing and therefore did not violate N.D.C.C. § 44-04-18.
4. N.D.C.C. § 12.1-44.1-28 does not apply to Mr. Volesky's June 21 request for access to records of juveniles "placed" at the SWMCCC or his June 28 request for copies.

STEPS NEEDED TO REMEDY VIOLATION

The SWMCCC must give Mr. Volesky the copies he requested on June 28. The SWMCCC must provide access to the "placement" files requested on June 21 within seven days of the date of this opinion, or a later date arranged by Mr. Volesky.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. *Id.*

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